Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden, *Petitioner*,

v.

BENJAMIN WAI SILVA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 applicable to death penalty cases pending in the federal district courts at the time of the new law was enacted?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

ARTHUR CALDERON, Warden, *Petitioner*,

v.

BENJAMIN WAI SILVA, *Respondent*.

Petitioner, Arthur Calderon, Warden, California State Prison at San Quentin, prays that a writ of certiorari be issued to review the order of the Court of Appeals for the Ninth Circuit issued on January 16, 1997, in this death penalty case.

OPINION OR JUDGMENT BELOW

The order of the Ninth Circuit Court of Appeals was issued on January 16, 1997. It is unreported. It is attached as Appendix A. The order refers to a prior order of the Ninth Circuit in another death penalty case, Jeffries v. Wood. That order was issued on December 20, 1996. It is reported at 103 F.3d 827.

The order of the federal district court that was the original source of this litigation was issued on June 24, 1996, is unreported. It is attached as Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1254(1) to review the interlocutory judgment of the Ninth Circuit holding that habeas corpus provisions of the Antiterrorism

and Effective Death Penalty Act of 1996 are not retroactive. This is an important, clear cut issue of law that is fundamental to the further review of the case and would otherwise qualify as the basis for certiorari. Estelle v. Gamble, 429 U.S. 97, 115, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); United States v. General Motors, 323 U.S. 373, 377, 65 S. Ct. 357, 89 L. Ed. 311 (1945). As such, this is an appropriate case for this Court to grant certiorari.

This petition is being filed within the ninety days of the order by the Court of Appeals for the Ninth Circuit.

CONSTITUTIONS, STATUTES OR REGULATIONS

The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are contained in 28 U.S.C. § 2244 et. seq. It is set out in its entirety as Appendix C.

STATEMENT OF THE CASE

In 1981, Benjamin Wai Silva kidnapped and then murdered Kevin Thorpe in a remote portion of Northern California. He was sentenced to death. That judgment was upheld by the California Supreme Court on June 9, 1988. People v. Silva, 45 Cal. 3d 604, 754 P.2d 1070 (1988). Silva's petitions for writ of certiorari have been repeatedly denied by this Court. Silva v. California, 494 U.S. 1039, 110 S. Ct. 1502, 108 L. Ed. 2d 637 (1990) and Silva v. California, 488 U.S. 1019, 109 S. Ct. 820, 102 L. Ed. 2d 809 (1989).

Silva filed a Petition for Writ of Habeas Corpus in the Federal District Court for the Central District of California. Following extensive briefing, that court had

ordered a limited evidentiary hearing. With the passage of the Antiterrorism and Effective Death Penalty Act of 1996, the court ruled that the Act was applicable to the case at bar, but that the Act did not alter the standards for an evidentiary hearing. Recognizing the critical nature of its rulings, the district court issued a stay and gave Petitioner permission to seek an interlocutory appeal to the Ninth Circuit Court of Appeals.

Petitioner filed the Petition for Permission to Appeal on July 24, 1996. On November 20, 1996, in the case of Jeffries v. Woods, the Ninth Circuit issued an order (without opinion) that it had determined that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 did not apply to cases filed in the federal courts prior to the effective date of the Act, April 24, 1996. (App. B.)

On January 16, 1997, the Ninth Circuit issued an order denying the Petition for Permission to Appeal as moot because of the order in Jeffries v. Wood. (App. A.)

SUMMARY OF ARGUMENT

The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are retroactive and do apply to cases pending in the federal courts on the day the new legislation was signed into law and became effective. The Act does not alter the primary conduct obligations of the parties, it merely modifies the manner in which the federal courts will review certain habeas claims.

ARGUMENT

I.

THE PROVISIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ARE RETROACTIVE

Since the Ninth Circuit has merely issued an order setting forth its conclusion the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "the Act") are not retroactive, but has not issued an opinion explaining what reasoning lead to that conclusion, Petitioner is handicapped in his ability to attack the analysis of the Ninth Circuit. However, application of this Court's decisions on retroactivity show that under those standards, the Act does apply to cases pending in the federal courts at the time the Act became effective.

This Court recently provided important guidance on the general question of the application of new statutes to pending cases in Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Under Landgraf, this Court should consider, first, whether Congress has expressly prescribed the new statute's reach in pending cases. Id., at 273. In making this analysis in Landgraf this Court specifically declined to draw a negative inference on the question of retroactivity as to some parts of a new Act from the fact that Congress had explicitly spoken on the question of retroactivity as to other parts of the act. Id., at 259-62.

Congress has not explicitly spoken on the applicability or retroactivity question in the general class of habeas cases governed purely by chapter 153 of the Act. The question of the applicability of the new restrictions on

evidentiary hearings must be determined by this Court under other appropriate criteria.

Under Landgraf, it must be determined whether application of the statute to pending cases would be genuinely "retroactive" in a special sense of the word.

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law.

Landgraf, 511 U.S. at 269.

This Court should consider, for example, whether the statute deals primarily with the court's jurisdiction, procedures, or power to grant prospective relief; or whether, instead, it "impair[s] rights a party possessed when he acted, increase[d] a party's liability for past conduct, or impose[d] new duties with respect to transactions already completed." Id., at 280; Chenault v. U.S. Postal Service, 37 F.3d 535, 537 (9th Cir. 1994); see U.S. v. 403½ Skyline Dr., La Habra Heights, CA, 797 F. Supp. 796, 799 (C.D.Cal. 1992) (statutes merely affecting remedies apply to pending cases). In the former situation, the court should abide by the rule that it should "'apply the law in effect at the time it renders its decision'" -- that is, apply the intervening new statute immediately to the case at bar. Landgraf, 511 U.S. at 264. In the latter type situation, most often arising in the areas of "contractual or property rights" where actors rely on the predictability and stability of the law at the time of the transaction, the court should apply a presumption that the new law does not apply "retroactively" to alter the effect of the prior primary conduct of individuals in a new way. Id., at 271-3.

Here, new 28 United States Code section 2254(e) sets strict limitations on evidentiary hearings in determining whether the custodian should be ordered to release the prisoner from restraint. The restriction is, in

essence, a rule governing the federal court's jurisdiction, procedures, and power to grant prospective relief. As such, it "'speak[s] to the power of the court rather than to the rights or obligations of the parties,'" and regulates "secondary" rather than "primary" conduct, so its immediate application to the case at bar would not truly be "retroactive." Landgraf, 511 U.S. at 274 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." [Emphasis added].) It does not impair any "right" a habeas petitioner possessed when he "acted," increase his liability for his past conduct, or impose any new duties with respect to transactions already completed. Id., at 280; Chenault, 37 F.2d at 537. The new restriction on evidentiary hearings does not even purport to determine the legality or constitutionality of any act of the habeas petitioner or any of the events alleged as bases for relief in a habeas petition. It addresses simply the question of the process by which the federal court will entertain federal habeas corpus claims. Because habeas corpus cases are themselves collateral in nature, changes in the operation of the habeas statute do not operate in a genuinely "retroactive" way even when applied immediately to pending cases. See Landgraf, 511 U.S. at 274. As the Ninth Circuit has stated, "A statute is not retroactive merely because the facts upon which its subsequent application depends are drawn from a time antecedent to its effective date." Samaniego-Meraz v. I.N.S., 53 F.3d 254, 256 (9th Cir. 1995). While the habeas proceedings depend on the antecedent facts of the crime and the trial, the new legislation deals only with how a federal court will resolve the claims of error. This does not make the statute retroactive within the meaning of Landgraf.

Moreover, nothing in Landgraf indicates that the likelihood of different results would serve to disfavor "'apply[ing] the law in effect at the time [the court]

renders its decision.'" Landgraf, 511 U.S. at 264 ("We have regularly applied intervening statutes conferring or ousting jurisdiction."). However the effect of the limitation on evidentiary hearings reforms might be described, they do not upset legitimate reliance interests, change the legal effect of the primary conduct of individuals in their affairs, or divest people of vested rights. Instead, they govern the secondary conduct of courts on procedural questions affecting the availability of prospective relief. Whether such effects might be termed "far reaching," or whether the hearing procedures simply change a longstanding statutory procedure, is immaterial.

In describing the circumstances in which retroactive applications of intervening statutes is disfavored, Landgraf consistently emphasized the value of fostering confidence in laws upon which people rely, in their primary activity, to gauge the legal consequences of their actions, and the fairness concern implicated by the imposition of new burdens on private rights after the fact. Landgraf, 511 U.S. at 265-6. Landgraf launched its discussion on retroactivity by emphasizing that:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Id., at 265.

But Silva can hardly complain that he relied to his detriment on the then-prevailing scope of federal habeas review in deciding to kill Kevin Thorpe in 1981. And he can not complain that, in his primary conduct, he actually relied to his detriment in any other way with respect to old law changed by the new Act. To so argue would be to totally muddle the distinction between Silva's primary conduct at the time of the crime with his tactical

decisions made years later during the course of the litigation. The focus of Landgraf is on the primary conduct, not the legal maneuvering defending against charges based on that primary conduct.

The Ninth Circuit has graphically illustrated this point in U.S. ex. rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402 (9th Cir. 1995). In that case, the defendant was sued under the Federal False Claims Act. After the crime, but before the trial, the law was altered so as to limit the power of a federal court to hear certain types of claims. The Ninth Circuit rejected an assertion that the amendment could not be applied to the then-pending litigation stating the change did not alter General Dynamics' primary conduct. "The amendment simply did not alter GD's underlying obligation not to commit fraud upon the government." Id., at 1408. Similarly, the change in the law in the case at bar did not operate to alter Silva's underlying obligation to not murder Kevin Thorpe. Thus, the Act should be applied retrospectively.

Moreover, the Ninth Circuit's position amounts to a subtle attempt to hijack the state's preeminent reliance interests in the enforcement of criminal judgments rendered in accordance with "clearly established" federal law. A defendant should not be allowed to convert the pre-reform standards regarding evidentiary hearings into a "vested right" of his own. Silva had no "matured" or "unconditional" property right in statutory habeas procedures. See Campbell v. United States, 809 F.2d 563, 567 (9th Cir. 1987). Surely Congress did not pass the original Habeas Corpus Act as a private relief bill for Silva's personal benefit. Under the Ninth Circuit's view, in addition, it would seem that the Act can never be enforced against any person who committed any crime before the President signed the Act.

The foremost purpose of federal habeas corpus is not to vindicate the underlying constitutional claim, but simply to insure that state courts adhere to the

Constitution, not as it later might be applied, but only "as interpreted at the time of the proceedings." Saffle v. Parks, 494 U.S. 484, 488, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1989); see Kuhlmann v. Wilson, 477 U.S. 436, 447, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). Accordingly, under the Teague v. Lane doctrine, the federal courts may not retroactively upset the finality of state convictions by applying "new" rules not "clearly established" when the state court decided the case. Sawyer v. Smith, 497 U.S. 227, 236, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990); Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Indeed, the interest in protecting final state judgments is so elevated in importance that it operates as a one-way street, prohibiting the grant of habeas relief based on rules post-dating the finality of the state adjudication, but allowing the denial of a habeas claim based upon application of such a rule in the state's favor. Lockhart v. Fretwell, 506 U.S. 364, 372-3, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The new legislation codifies and extends the Teague protections of the state judgment, by requiring that a state judgment on the merits precludes relief unless it is shown to have been, in the context of the time and the evidence presented, contrary to "clearly established" federal law or an unreasonable application of that law.

Precisely because it focuses on the reasonableness of the state merits adjudication at the time, application of the new Act to defeat the claims in this case would vindicate rather than defeat the legitimate "notice," "reliance," and "expectations" interest implicated in the case at bar. In the unique context of federal habeas review of state judgments, then, immediate application of the 28 United States Code section 2254 deference standard would further, rather than frustrate, the principle that in other contexts might tend to militate against immediate application of a new statute to a pending case:

the "'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" Landgraf, 511 U.S. at 265. Any predisposition against genuine retroactive application of an act of Congress that might normally prevail would be misplaced with respect to a statute that further protects the finality of state criminal judgments from federal habeas review.

Therefore, the reform prohibiting discretionary evidentiary hearings in cases where a habeas petitioner has failed to develop the "factual basis" of his claims in state court would apply to the case at bar, notwithstanding the Ninth Circuit's retroactivity argument. The restriction on evidentiary hearings does not defeat any legitimate reliance interest of a habeas petitioner. It does not increase a habeas petitioner's liability for his prior primary conduct. It does not impose upon him new duties with respect to transactions already completed. It does not divest him of a "vested right." Nor does it even purport to govern Silva's or anybody's "primary" conduct. As the Ninth Circuit has noted, "a remedial statute, which relates to practice, procedure or remedies and does not affect a substantive or vested right, often is deemed *not* to have a retroactive effect." U.S. v. Bacon, 82 F.3d 822, 824 (9th Cir. 1996); emphasis in original.

The evidentiary-hearing restriction, instead, is a rule governing court procedures. It thus should apply immediately in a pending case. See Turner v. United States, 410 F.2d 837, 840-1 (5th Cir. 1969) (new draft law discontinuing appeal hearings for conscientious objector applies to pending cases); see also United States v. Haughton, 413 F.2d 736, 738 (9th Cir. 1969) ("Statutes effecting procedural changes, which do not otherwise alter substantive rights, generally are considered immediately applicable to pending cases."); Graham v. Solem, 728 F.2d 1533, 1536-1538 (8th Cir. 1984) (total exhaustion rule of Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d

379 (1982) applies retroactively); Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976) (Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) applies retroactively); Tisnado v. United States, 547 F.2d 452, 455 (9th Cir. 1976) (same). That an intervening statute affects prospective relief does not create a retroactivity problem. Landgraf, 511 U.S. at 268-9. Silva has not been deprived of his right to challenge his conviction by showing that he received the ineffective assistance of counsel. He may still make such a showing. All that has been changed are the methods by which a habeas petitioner must make his showing.

As this Court is aware, this issue has created a major split of opinion amongst the federal circuit courts. Compare Lindh v. Murphy, 96 F.3d 856, 861-877 (10th Cir. 1996), cert. granted 117 S. Ct. 726 (1997) and Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), cert. denied, 65USLW3598 (1997) with Boria v. Keane, 90 F.3d 36, 37-8 (2nd Cir. 1996) and Edens v. Hannigan, 87 F.3d 1109, 1111 n.1 (10th Cir. 1996). This Court should grant review to resolve this major split of opinion amongst the courts of appeal

Therefore, the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 do apply to Silva's case. The order of the Ninth Circuit in this case should be reversed.

II.

THIS IS AN APPROPRIATE CASE FOR THE COURT TO GRANT CERTIORARI

This case presents an issue that is clear cut, fundamental to the further conduct of the case and would otherwise qualify for a grant of certiorari. This Court should grant certiorari even though this case asks this Court to review an interlocutory order.

Petitioners recognize that this Court has held that:

> [T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. v. Jacksonville, T. & K. W. RY. Co., 148 U.S. 372, 384, 13 S. Ct. 758, 37 L. Ed. 486 (1893).

However, this Court has held that where there is an important, clear cut question of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. Estelle v. Gamble, 429 U.S. 97, 115, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); United States v. General Motors Corp., 323 U.S. 373, 377, 65 S. Ct. 357, 89 L. Ed. 311 (1945).

This case meets every one of these tests. The retroactivity of the Antiterrorism Act of 1996 is a clear cut purely legal question. Resolution of the Ninth Circuit's decision will govern not only Silva's case but every other death penalty case pending in the Ninth Circuit. There can be little doubt that this issue is worthy of certiorari on

its own as this Court has granted review in a closely related question in Lindh.

Moreover, since the resolution of this question will impact every death penalty case pending in every federal court in this country at the time the new Act was signed, it is an important question in the administration of criminal justice worthy of a grant of certiorari even though it involves an interlocutory order. DiBella v. United States, 369 U.S. 121, 124, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962). The resolution of the question presented here will answer the most fundamental question involving every federal death penalty habeas corpus case -- what law applies?

Therefore, given the clear cut purely legal question presented in this case, given the huge impact this issue will have nationwide and since this Court has already recognized that the question presented is worthy of a grant of certiorari, this Court should grant certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submit that the Writ of Certiorari should issue to review the decision of the Court of Appeals for the Ninth Circuit in this case.

Dated: April 7, 1997.

Respectfully submitted,

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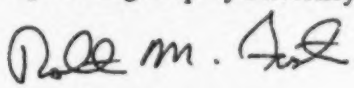

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